

State of Colorado



Bill Owens
Governor

Richard Djokic
Director

DPA

Department of Personnel
& Administration

State Personnel Board
The Chancery
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AGENDA PUBLIC BOARD MEETING September 21, 2004

A public meeting of the State Personnel Board will be held on Tuesday, September 21, 2004, at the Fort Lewis College, Memorial Student Lounge, Durango, Colorado 81301. The public meeting will commence at 9:00 a.m.

Persons wishing to attend the meeting telephonically may do so by appearing at the **offices of the State Personnel Board, 1120 Lincoln Street, Suite 1420, Denver, Colorado, on Tuesday, September 21, 2004, at 9:00 a.m.**

Reasonable accommodation will be provided **upon request** for persons with disabilities. If you are a person with a disability who requires an accommodation to participate in this meeting, please notify Board staff at 303-764-1472 by September 16, 2004.

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I. REQUESTS FOR RESIDENCY WAIVERS

A. September 1, 2004 Report on Residency Waivers

Reports are informational only; no action is required.

II. PENDING MATTERS

There are no pending matters before the State Personnel Board this month.

III. REVIEW OF INITIAL DECISIONS OR OTHER FINAL ORDERS OF THE ADMINISTRATIVE LAW JUDGES OR THE DIRECTOR ON APPEAL TO THE STATE PERSONNEL BOARD

There are no Initial Decisions or Other Final Orders of the Administrative Law Judges or the Director on appeal to the State Personnel Board this month.

IV. REVIEW OF PRELIMINARY RECOMMENDATIONS OF THE ADMINISTRATIVE LAW JUDGES OR THE DIRECTOR TO GRANT OR DENY PETITIONS FOR HEARING

A. Barbara Mickens v. Department of Corrections, Limon Correctional Facility, State Personnel Board case number 2003G076(C).

Complainant petitions the Board to grant a discretionary, evidentiary hearing to review Respondent's denial of Complainant's grievance and issuance of corrective actions. Complainant argues that she was subject to discrimination by Respondent based upon race, age, and gender, and retaliation, which resulted in her filing a complaint with Respondent, and an initial petition for hearing with the Board, on December 9, 2002. As the basis of her claims, Complainant's assertions include:

- In November 2002, she learned that the Associate Warden had received a letter purportedly accusing her of discussing DOC policy with persons outside DOC. The Associate Warden admonished her not to discuss policy with persons outside DOC, and gave the letter to Major Williams, who had supervisory oversight of Complainant at the time, and requested that Williams discuss the letter with Complainant. Major Williams did not discuss the letter with Complainant.
- In November 2002, Complainant was advised by Capt. Lockhart that Respondent had several reports concerning Complainant in her personnel file, and that he would show them to Complainant; however, despite written requests by Complainant to see the documents, Respondent did not provide them to Complainant.
- In December 2002, she learned from inmates that Major Williams had interrogated them as to whether they had any knowledge of illegal activity in which Complainant may be involved.
- While she was the coordinator of the SHAPE-UP program for Respondent from June 2000 through July 2002, she was accused of allowing an inmate enrolled in the program to have an affair with a staff person from the Denver District Attorney's Office involved in the program, and was allegedly under investigation for this incident because she knew about the relationship, failed to report it, and would be arrested as a result. However, when she learned of this incident, Complainant fired the inmate from the program and contacted the SHAPE-UP Advisory Board member from the Denver District Attorney's Office to advise him about the communication, which was the proper protocol under the agreement governing administration of the program.
- In connection with her involvement with the SHAPE-UP program, Complainant was informed Major Williams had taken inmates aside and asked them to provide DOC staff with information, including memos and computer disks, concerning her work in the program. At no time was Complainant informed of such action from the Warden or management.
- Complainant was moved from the SHAPE-UP Coordinator position to cell house duties in July 2002. The reason given to Complainant for the move was the program was being eliminated due to recent state budget cuts. However, Complainant asserts she was later informed by other DOC staff that her new supervisor had been overheard saying, "Let me have her and she will get really upset and quit and she will take her husband with her leaving us two vacant savings positions." Complainant believed, based on the comments from other staff members, that management either hated the SHAPE-UP program or disliked her and planned to get rid of it.

On December 4, 2002, Complainant advised Warden Watkins of actions by Major Williams and the hostile work environment, retaliation, discrimination and/or sexual harassment and the feeling of physical threat and intimidation created by such actions.

On or about December 12, 2002, Respondent's Inspector General's Office received the complaint submitted by Complainant on December 4, 2002, and opened an investigation into the allegations and claims raised. In January 2003, an investigative report issued finding that Complainant's allegations had not been corroborated. The report was then forwarded to the appointing authorities for review, and returned to Warden Watkins to take any action he deemed necessary.

After notice to Complainant, a Rule R-6-10 meeting was held on March 4, 2003. The notice advised Complainant that the purpose of the meeting was to discuss allegations of negligent false reporting of discrimination by Complainant. Based on discussion at this meeting, Warden Watkins interviewed two witnesses identified by Complainant as corroborating her allegations, Sgt. Knox and Lt. Outen. Warden Watkins concluded these witnesses did not corroborate Complainant's allegations, and on April 3, 2003, he issued a corrective action to Complainant for negligently reporting false and inaccurate information, in violation of certain Administrative Regulations (ARs) promulgated by Respondent, including a regulation addressing negligent false reporting of discrimination. In the corrective action, Complainant was required to read and provide a written understanding of the regulations she was found to have violated, with the writing due by April 30, 2003.

Complainant filed her petition for hearing on April 10, 2003, based on the corrective action issued by Respondent, asserting retaliation and a claim under the Colorado Whistle Blower Statute. The Whistle Blower claim was referred to the Colorado Personnel Director for investigation pursuant to Board Rule R-8-24 on June 9, 2003.

On April 16, 2003, Complainant filed her Step I grievance with Respondent based on the corrective action, and requested that the corrective action be dismissed and removed from her personnel file, among other relief. On the same date, Complainant asserts she submitted to Respondent her written understanding of the ARs set forth in the corrective action to comply with the corrective action.

Complainant's Step I grievance was denied by Respondent on April 17, 2003, and on or about April 28, 2003, she initiated her Step II grievance with the Assistant Director of Prisons. Subsequent to a meeting between Complainant and the Assistant Director of Prisons on May 13, 2003, the Assistant Director of Prisons denied the Step II grievance effective May 27, 2003. At the same time, the Assistant Director extended the deadline for Complainant to comply with the corrective action until June 16, 2003.

Complainant appealed this final grievance decision to the Board on June 4, 2003, asserting a Whistle Blower claim as well. On June 11, 2003, Complainant filed another petition for hearing with the Board based on the final grievance decision of May 27, 2003, and asserted discrimination based upon age, race/creed/color, and sex. All the petitions for hearing and appeals filed by Complainant were consolidated on June 24, 2003.

On July 7, 2003, Respondent issued a corrective action to Complainant for non-compliance with the initial corrective action and the required that a written understanding of the ARs be submitted by June 16, 2003. Although Complainant had filed with the Board for review of the corrective action and her allegations, Respondent concluded that since the Board's Administrative Law Judges had entered no stay, Complainant was required to comply with the corrective action until the Board determined Complainant's allegations. This corrective action not only required Complainant to comply with the first corrective action by July 31, 2003, it required her to attend a class on Professionalism at Respondent's Training Academy within ninety days, and submit a written understanding of the class within ten days of Complainant completing the course.

Complainant responded to the July 7 corrective action on July 22, 2003, denying that she intentionally disregarded the sanction imposed on her. Relative to her right to file a grievance, Complainant advised Respondent that she had previously grieved the matter, and filed her petitions with the Board. On August 20, 2003, Respondent replied to this response from Complainant by reiterating that since no stay had been entered, she must comply with the corrective action. Respondent also extended the deadline for compliance to September 10, 2003. On or about August 24, 2003, Complainant submitted a nine-page response as her compliance with both corrective actions.

On July 25, 2003, the Colorado Director of Personnel issued a report relative to the investigation of Complainant's Whistle Blower claim, and found no probable cause to credit her allegations.

On September 22, 2003, the Colorado Civil Rights Division issued its opinion at the conclusion of its investigation of Complainant's discrimination claims, and determined it lacked jurisdiction of allegations that Complainant was subjected to discrimination in terms of her terms, conditions, and privileges of employment. However, the Division further concluded that there was sufficient evidence from the investigation to support Complainant's claim of retaliation by Respondent.

Respondent argues that the issuance of the corrective action to Complainant in April 2003 was not arbitrary and capricious because Complainant caused a full-scale investigation based purely on second- and third-hand hearsay "through the grapevine." Further, it was not arbitrary and capricious for Warden Watkins to attempt to prevent such debacles in the future. Watkins was attempting a reasoned and measured way to try and minimize a repeat of what the Limon facility had gone through due to allegations against Williams, where none of Complainant's suppositions held true. Additionally, Respondent argues Complainant failed to present a *prima facie* case of retaliation since she did not suffer an adverse employment action because the corrective action was intended to correct and improve performance or behavior and did not affect her current base pay, status or tenure.

While the Director concludes the uncontroverted evidence shows that issuance of the corrective action in April 2003 did not currently affect Complainant's compensation and employment, the evidence establishes that the corrective actions of April and July threaten materially adverse changes to the terms and conditions of Complainant's employment. The corrective action issued by Respondent for negligent false reporting of claims of discrimination, harassment and hostile work environment on April 3, 2003, was without precedent; the evidence shows that no other employee had been cited for alleged negligent false reporting other than Complainant.

The Director further concludes that the requirement in the corrective actions that Complainant write reports of her understanding of certain ARs that she was alleged to have violated imposed conditions that stem from an unprecedented action by Respondent. These requirements may be viewed as humiliating and calling into question Complainant's reputation and integrity. The evidence indicates these corrective actions currently remain in Complainant's personnel file with no indication that the corrective actions will not be considered in future personnel actions. Based on the particular circumstance, the Director finds that Complainant did establish a *prima facie* showing that the corrective actions in question may constitute an adverse employment action.

Regarding Complainant's claims of discrimination based upon age, race, and gender, the Director concludes Complainant did not sustain her burden of establishing an inference of unlawful age, race and gender discrimination, and further is unable to demonstrate a discriminatory basis to her allegation of hostile work environment. However, relative to the claim of retaliation, the Director concludes that Complainant has shown evidence that

she engaged in a protected activity of opposing discriminatory conduct of or filing a charge of discrimination, was subjected to adverse employment action, and a causal connection exists between the protected activity and the adverse employment action. Complainant need not prove the validity of the complaint she submitted to Respondent and the Board in December 2002 that resulted in the corrective action issued in April 2003; such "opposition activity" is protected even when based on a mistaken good faith belief that the opposed conduct or behavior by Respondent was discriminatory. Complainant has satisfied her burden regarding the elements for a claim of retaliation.

In connection with the complaint submitted to Warden Watkins in December 2002, the Director concludes the evidence shows Respondent promptly undertook steps in reviewing the matter by forwarding the complaint to its Inspector General (IG) section for investigation, and that the IG investigation included interviews of Complainant and witnesses identified by Complainant as corroborating her claims. However, the evidence shows that on or about May 5, 2003, Complainant submitted to the Board and Respondent's counsel a statement prepared by Mary West-Smith, the then-coordinator of the SHAPE-UP program, detailing the incident involving the alleged affair between an inmate and staff person from the Denver District Attorney's Office, discussed above, as well as other incidents observed by West-Smith at the Limon facility that were not observed at other DOC facilities. In this statement, Ms. West-Smith concludes that based on her personal knowledge from observations and conversations with staff and inmates, she had reason to believe certain persons were engaged in discriminatory practices, including Major Williams. There is no evidence included in the IG report or otherwise that indicates Respondent considered the information Ms. West-Smith provided in determining to issue not only the corrective action in April 2003, but also the subsequent corrective action of July 7, 2003.

Further, while Lt. Outen was interviewed in the course of the IG investigation, the Director concludes the IG investigative report failed to disclose statements made by Lt. Outen regarding Complainant's claims. These statements included her impressions of Complainant being treated differently by management for Respondent and the belief that Complainant would quit her employment if she were transferred from the SHAPE-UP program.

Based on the evidence, the Director concludes that it appears Respondent neglected or refused to use reasonable diligence or care in procuring lawfully authorized evidence. Further, it appears Complainant has presented a valid issue as to whether Respondent failed to give honest and candid consideration to the evidence prior to determining Complainant had committed negligent false reporting of allegations of discrimination in December 2002. Complainant contends (and Respondent does not dispute) that Respondent has an established policy that prohibits retaliation for the filing of a complaint alleging sexual harassment and/or discrimination. However, Respondent, after completion of the IG report in January 2003, invoked another AR as the basis for issuance of its April 3, 2003 corrective action.

On August 23, 2004, a Preliminary Recommendation of the Director was issued, recommending that a hearing on Complainant's claim of age, race and gender discrimination be **denied**, a hearing on Complainant's claim of hostile work environment be **denied**, and a hearing be **granted** on Complainant's claim of retaliation, arbitrary and capricious conduct by Respondent and relief that may be within the jurisdiction of the Board to award.

On August 25, 2004, Respondent filed a Petition to Reconsider arguing it did not act arbitrarily and capriciously. First, it had no knowledge of the Mary West-Smith statement or its contents, and that in light of the extensive investigation Respondent undertook, it would be unfair to charge it with knowledge of the statement. Further, as to the interview

of Lt. Outen, the memorandum of interview was in addition to the summary report of the lead IG investigator, and there is no evidence that Respondent failed to consider the entire interview.

As to the Director's conclusion relative to the retaliation claim, Respondent asserts there is no evidence that anyone in the past had made a negligent false report. Respondent's ARs provide that such reporting may result in corrective or disciplinary action, and it follows that Complainant may have been the first employee to violate this AR. Further, the possibility of disciplinary action for failure to comply with a corrective action is one of the maxims of progressive discipline, and is supported in Board Rule that a corrective action should include the consequences of failure to correct. Finally, case law holds that Complainant may not maintain a retaliation claim based on an unreasonable good faith belief that Respondent's conduct constitutes unlawful discrimination.

V. INITIAL DECISIONS OR OTHER FINAL ORDERS OF THE ADMINISTRATIVE LAW JUDGES OR THE DIRECTOR

A. Brent Tarver v. Department of Corrections, State Personnel Board case number 2004B138.

Complainant, a Correctional Officer I (CO I), appealed Respondent's termination for violation of administrative regulations. Complainant failed to comply with standards of efficient service or competence, willful misconduct, including either a violation or the State Personnel Board's rules or of the rules of the agency of employment, willful failure or ability to perform duties assigned and final conviction of a felony or any other offence involving moral turpitude. Complainant had engaged in giving inmates access to his personal post office box as a means of sending illegal drugs to later be brought into the facility, agreeing to engage in illegal conduct with inmates, and failing to report the inmates' repeated attempts to have Complainant bring drugs into the prison.

In late January 2004, a Buena Vista Correctional Complex (BVCC) inmate and confidential informant of the prison authorities notified BVCC staff that a correctional officer had agreed to bring methamphetamine into the complex in return for his receipt of one-third of the drugs. The inmate informed staff that the drugs were going to be delivered to the staff member's post office box. The inmate had provided accurate information about illegal activity in the prison on several previous occasions, and the confidential informant was reliable and credible. A few days after the initial tip, the informant revealed to the DOC Inspector General the number of the post office box in Buena Vista that would contain illegal drugs. Respondent's Inspector General representative met with the District Attorney's office to organize and plan surveillance of the package at the Post Office. On February 19, 2004 Complainant's wife arrived to pick up the package and was advised of the reason she was stopped and agreed to go to the police station for questioning.

On February 19, 2004, Complainant was arrested while at work and taken into police custody. Complainant denied his knowledge of the package. Complainant argues that he was approached by two inmates to bring drugs into the facility and stated he told them no. The inmates asked him for his address and Complainant states he did not give it to them but laid down a magazine that had a subscription address label with his post office address on the cover. Complainant denies any prior knowledge that a package would be delivered to his post office box and further denied any intent to bring drugs into the facility.

The ALJ found that Complainant committed the acts upon which discipline was based and concluded that Respondent's action was not arbitrary, capricious or contrary to rule or law. Respondent could no longer trust Complainant to enforce the prison rules and

regulations and posed a danger to the prison community and the public. The ALJ affirmed Respondent's disciplinary termination and dismissed Complainant's appeal with prejudice.

[The deadline for appealing the Initial Decision of the Administrative Law Judge is September 22, 2004.]

B. Bruce Rensel v. Department of Human Services, Office of Information Technology Services, State Personnel Board case number 2004B073.

Complainant, an Information Technology Professional III (IT III), appealed his termination of employment for failure to comply with the performance objectives and expectations noted in an August 14, 2003 memorandum, and not providing sufficient justification as to why he did not comply.

On January 2000 Complainant was given a corrective action for poor performance in the areas of professional/technical competence, communications, and organizational commitment by Barbara Gilmore (Complainant's direct supervisor at the time of his termination) after three or four months of her hire. Complainant complied with the corrective action but did not grieve the corrective action. Larry Collins, IT III for DHS nursing including the Homelake Nursing Home, learned that ARCServe was not backing up the Homelake server on May 21, 2003, and called Gilmore to advise her of the ARCServe backup problem on the Homelake servers and asked if she wanted him to fix it or if he should call Complainant. Gilmore advised Collins to contact Complainant regarding the backup problem. On May 21, 2003, Collins emailed Complainant asking if Collins should reload ARCServe and Gilmore was cc'ed on the email. Complainant spent four hours on the Homelake ARCServe problem, checking configuration files and replied to Collins, directing him to restart the Homelake server. The following day Complainant and Collins discovered there were still problems with the server at Homelake. Complainant then learned that the problem was not at Homelake but that the server itself was having problems. On May 28, 2003, the Homelake server was finally rebooted and the problem resolved.

On June 2, 2003, Gilmore issued a corrective action for Complainant's "lack of professional, technical and communicative competence" in connection with the May 2003 Homelake server backup problem. The corrective action states Complainant "did not provide any communication" to Gilmore via voicemail, email, in person and/or the weekly status updated regarding the Homelake problem; he did not enter a Priority 1 Help Desk ticket; and he did not communicate with the Homelake Director or Administrator regarding the backup problem. Complainant did not agree with the corrective action of June 2003 because he thought he had informed his manager and had handled the problem; however, Complainant did not grieve the corrective action due to his concern of retaliation against him.

On August 4, 2003, Steve Swanson, DHS Chief Technology Officer, sent Complainant a letter notifying him of a Board Rule R-6-10 meeting to discuss non-compliance of the June 2, 2003 corrective action. The R-6-10 meeting was held on August 12, 2003, and on August 13, 2003, Swanson imposed a disciplinary action against Complainant by reducing Complainant's salary by \$500.00 for the month of September.

The ALJ found that Complainant did not commit the acts for which he was disciplined. Complainant was terminated for failure to perform competently under the objectives and expectations of Gilmore's August 14th memo. While failure to perform competently is an allowable basis for discipline, under Board Rule R-6-5 an employee may only be corrected or disciplined once for a single incident but may be corrected or disciplined for each additional act of the same nature. There was no evidence as to Complainant's

performance from August 14, 2003, through September 26, 2003. Respondent did not present any notes or documentary evidence that Complainant did not perform the objectives and expectations outlined in Gilmore's August 14th memo. Respondent did not present any type of evaluations of Complainant's performance, and Gilmore, in Respondent's rebuttal case, did not recall any specific performance issues from August 14th through September 26, 2003. Respondent did not meet its burden of establishing that Complainant failed to meet the objectives and expectations of the August 14, 2003 memo.

The ALJ found that actions predetermining the outcome of a pre-disciplinary meeting or that make an employee's attempts to present mitigating information during such a meeting futile violate both the spirit and letter of the R-6-10 process. An email dated September 15th from Eich to Gilmore instructs Gilmore to terminate Complainant's computer and building access while he was in the meeting with Swanson, an instruction that presumes the outcome of the R-6-10 meeting. Eichs' instructions to Swanson render the September 26, 2003 meeting a meaningless exercise with a foregone conclusion. The ALJ found that the discipline imposed was not within the range of reasonable alternatives.

On August 26, 2004, the ALJ ordered Respondent's action be rescinded and Complainant be reinstated to his former position or a comparable position with full back pay and benefits and attorney fees and costs awarded to Complainant.

[The deadline for appealing the Initial Decision of the Administrative Law Judge is September 27, 2004.]

VI. REVIEW OF THE MINUTES FROM THE AUGUST 17, 2004 PUBLIC MEETING OF THE STATE PERSONNEL BOARD

VII. ACKNOWLEDGMENTS

DECISIONS OF THE STATE PERSONNEL BOARD MADE AT ITS AUGUST 17, 2004 PUBLIC MEETING:

- A. Albert McNeill v. Department of Labor and Employment, State Personnel Board case number 2004G006.

The Board voted to adopt the Preliminary Recommendation of the Administrative Law Judge and deny petition for hearing.

- B. Richard Quintana v. Department of Corrections, State Personnel Board case number 2004G067.

The Board voted to adopt the Preliminary Recommendation of the Administrative Law Judge and deny the petition for hearing.

VIII. REPORT OF THE STATE PERSONNEL DIRECTOR

IX. ADMINISTRATIVE MATTERS & COMMENTS

A. ADMINISTRATIVE MATTERS

- Cases on Appeal to the Board and to Appellate Courts

B. OTHER BOARD BUSINESS

- C. GENERAL COMMENTS FROM ATTORNEYS, EMPLOYEE ORGANIZATIONS,
PERSONNEL ADMINISTRATORS, AND THE PUBLIC

X. EXECUTIVE SESSION

- A. Case Status Report

NEXT REGULARLY SCHEDULED BOARD MEETINGS - 9:00 a.m.

October 19, 2004	Colorado Department of Public Health and Environment 4300 Cherry Creek Drive South Denver, CO 80246
November 16, 2004	Colorado Department of Transportation 4201 East Arkansas Ave., Second Floor Auditorium Denver, CO 80222
December 21, 2004	Colorado Department of Transportation 4201 East Arkansas Ave., Second Floor Auditorium Denver, CO 80222
January 18, 2005	Colorado Department of Transportation 4201 East Arkansas Ave., Second Floor Auditorium Denver, CO 80222
February 15, 2005	Colorado Department of Transportation 4201 East Arkansas Ave., Second Floor Auditorium Denver, CO 80222
March 15, 2005	Colorado Department of Transportation 4201 East Arkansas Ave., Second Floor Auditorium Denver, CO 80222
April 19, 2005	Colorado Department of Transportation 4201 East Arkansas Ave., Second Floor Auditorium Denver, CO 80222
May 17, 2005	Colorado Department of Transportation 4201 East Arkansas Ave., Second Floor Auditorium Denver, CO 80222
June 21, 2005	Colorado Department of Transportation 4201 East Arkansas Ave., Second Floor Auditorium Denver, CO 80222